MBI Acquisition Corp. d/b/a Gayfers Department Store *and* International Brotherhood of Electrical Workers, Local Union No. 756, AFL–CIO. Case 12–CA–15841 (1–2)

November 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge filed by the Union on October 12, 1993, an amended charge filed on October 28, 1993, and a second amended charge filed on November 26, 1993, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on January 31, 1995, alleging that the Respondent violated Section 8(a)(1) of the Act by (1) promulgating, maintaining, and enforcing an overly broad no-solicitation rule; and (2) threatening subcontractor employees with arrest and causing them to be removed from the Respondent's property by police because they engaged in the distribution of area-standards handbills directed at customers of the Respondent on the Respondent's premises.

On August 5, 1996, the General Counsel, the Respondent, and the Charging Party filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties stated that the charges, amended charges, complaint, answer, order postponing the hearing indefinitely, and the stipulation of facts constitute the entire record in this case and that they waive a hearing before an administrative law judge. On September 18, 1996, the Board approved the stipulation and transferred the proceeding to itself for issuance of a Decision and Order. The General Counsel, the Respondent, and the Charging Party have filed briefs; and the General Counsel and the Charging Party have filed reply briefs.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Nevada corporation, whose principal place of business is in Cincinnati, Ohio, operates a retail department store in Daytona Beach, Florida. The Respondent annually receives gross revenues in excess of $500,000 and purchases and receives materials and supplies valued in excess of $50,000 directly from points located outside the State of Florida.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

The Respondent engaged Peters Construction Company (Peters) as a general contractor to perform remodeling work at the Respondent s Daytona Beach, Florida store in Volusia Mall, a complex of 30-to-40 retail stores. Peters, in turn, subcontracted the electrical work to Baroco Electrical Construction Co. (Baroco). Baroco contracted directly with a temporary employment agency, the Second Shift, Inc., which supplied Baroco with some of the electricians working under its direction. The Respondent owns the store, the adjacent sidewalk, and the portion of the parking lot from the store s south side to the public right of way on Volusia Boulevard.

Volusia Boulevard runs generally east to west. The posted speed limit on Volusia Boulevard is 45 m.p.h. During all times material to the complaint, major construction was in progress on Volusia Boulevard stretching the entire length of Volusia Mall. On the south side of the Respondent's store adjacent to Volusia Boulevard is a berm through which a 24-foot-wide entry road runs from the Boulevard for about 425 feet to the south exterior entrance of the Respondent's store.

A temporary partition separated the portion of the store building that was being renovated from the sales areas. Baroco employees were occasionally asked to perform work in the retail area, in the presence of customers; after October 15, 1993, they were asked to limit themselves to the work area only. The Respondent has also made a portion of its parking lot available to construction contractors and their employees, but did not instruct them to use that lot exclusively until October 20. The same day, the Respondent directed general contractor Peters to advise all persons on the construction project to stay out of areas of the store normally used by customers.

There are four public entrances to the Respondent's store: south, east, and west exterior entrances, all leading from the outside parking lot/sidewalk to the store; and a north interior mall entrance to the store leading directly from the enclosed mall ''common area'' owned by Volusia Mall. There is also a construction entrance/dock in the northeast corner of the store. On October 15, Baroco's employees were told for the first time to use this construction entrance exclusively.

The Respondent has maintained the following rule:

> There must be no solicitation by anyone for purchases or donations of any kind or for membership in any organization, lodge, or society nor any distribution of any written or printed material on the selling floor or in any other area used by the public at any time during the store's open hours

> nor at any other place on [the Respondent's] premises during work time.

The Respondent has also published a handbook, which it distributed to store employees containing a no-solicitation rule providing:

> There must be no solicitation by anyone for purchases or donations of any kind or for membership in any organization, lodge or society nor any distribution of written or printed material in selling areas at any time during the store's open hours nor at any other place on our premises during working time.

On August 27, the Union advised Baroco that it was organizing Baroco's jobsite at the Respondent's store and that Baroco employees Bruce Evans, Leon Brown, and Eric Chevrier were on the organizing committee. On August 30, Evans, Brown, and Chevrier began wearing T-shirts displaying the union insignia on the construction jobsite.

On October 7 or 8, at the beginning of their 11:30 a.m. lunchbreak, Evans, Brown, and Chevrier walked to their cars in the parking lot of the Respondent's store and retrieved a stack of leaflets. Evans and Chevrier began distributing the leaflets at the south exterior entrance to the store. The Respondent's representative, Loss Prevention Manager Sue Elder, approached and told them that they were not permitted to handbill on the store property. Evans and Chevrier complied with Elder's instructions. In the meantime, Brown had begun handbilling at the interior mall entrance to the store.[1] After Elder spoke to them, however, Evans and Chevrier motioned to Brown to stop handbilling, and he complied. Later that day, Evans and Brown heard Elder tell another employee that, if they were again observed handbilling on store property, she would have them arrested.

On October 15, during their lunchbreak, Brown and Chevrier distributed handbills at the interior mall entrance to the store, and employee Evans distributed handbills at the south exterior entrance. In separate conversations, the Respondent's store manager, Tony Lewis, and store operations manager, Tom Wissing, told Brown and Chevier, and then told Evans, that it was against the Respondent s policy for them to handbill on store property. Lewis and Wissing further told the employees that the only place where they were permitted to handbill was on the public right of way and berm adjacent to the Respondent's property. When the employees told Lewis and Wissing that they would not stop distributing handbills at the store entrance, Lewis threatened them with arrest.

On October 18, Evans passed out handbills to customers at the store s south entrance during his lunch hour. At about the same time and still during their lunch hour, Brown and Chevrier passed out handbills at the interior mall entrance door to the store. All three were told by store management to stop handbilling, but they continued. By an October 19 letter to Union President Steven Williams, Store Manager Lewis protested the distribution of leaflets by union representatives on store property. The letter stated, inter alia, that ''[t]he handbilling by representatives of [the Union] on 10–15–93 and 10–18–93 was in violation of Gayfers' no-solicitation rule which has been uniformly applied.''

During their lunchbreak on October 20, Evans, Brown, and Chevrier resumed their leaflet distribution and were again threatened with arrest by store management. This activity was videotaped by the store security. Shortly after the employees returned to work from their lunchbreak, they were escorted to the general contractor's office, where they were met by representatives of general contractor Peters and the Respondent, along with two police officers. Officer Joseph Heller advised the three employees that they were trespassing, and they were removed from the Respondent's property by the police officers. Officer Heller advised the employees that there was a designated area not on the Respondent's property where they would be allowed to handbill, the berm next to Volusia Boulevard. The employees were allowed to retrieve their personal tools before they were escorted off the property.

On October 21, Union President Williams spoke with assistant city attorney Greg McDole regarding the events of October 20. Arrangements were made for the Daytona Beach police to escort the employees back onto the store property. Accordingly, police officer Tom Carter escorted the three employees to the construction entrance, where he spoke with representatives of the Respondent and advised them that the trespass warnings were not valid. Thereafter, the employees signed in and reported to Baroco Project Manager

[1] The message on the handbill read as follows:

> 30% OFF
>
> Gayfers Department Store is using Baroco Electric Construction Company, an electrical contractor from outside this area, to perform its work. Baroco is paying its employees approximately *30% less* than the area wage rates established for electricians by Local Union 756 of the International Brotherhood of Electrical Workers (IBEW), AFL-CIO.
>
> It is simple economics that employers who pay depressed or substandard wages and benefits adversely affect you and others who live and work in this area. Please support us and help yourself by patronizing stores that employ contractors from our area who pay fair wages and benefits. Please express your concern to Gayfers and
>
> DON'T SHOP
> GAYFERS
> DEPT. STORE
> PLEASE DO NOT LITTER!!!

Newhauser. Newhauser advised the three employees that the Respondent still wanted them off the retail store premises and told them to wait while he made some phone calls. After about 1-1/2 hours of waiting, at about 11:20 a.m., Newhauser instructed the employees to take their lunchbreak. The employees then retrieved leaflets from their automobiles. Evans and Chevrier resumed distribution outside the exterior store entrances, and Brown resumed distribution at the north interior mall entrance. The Respondent's representatives ordered them to cease distribution or leave the property under threat of arrest. The employees refused to leave.

On October 21, Union President Williams sent two advertisements by facsimile to the News-Journal, a Daytona Beach, Florida newspaper, both of which contained an area-standards message to customers. The first was rejected by the marketing director of the News-Journal. Williams was advised by the marketing director that the second would be accepted for a full-page advertisement, provided Williams paid in excess of $4400 per day for each day the ad would run. Williams rejected this potential means of reaching the Respondent's customers as too costly.

Again on October 22, at about 11:35 a.m., Evans, Brown, and Chevrier distributed handbills at three of the store entrances. On October 27, the Union was served with a summons by the Volusia County Clerk, attached to which was a Petition for Injunction and Restraining Order setting forth the Respondent's evidence of alleged trespass under Florida state law by defendants Brown, Evans, and Chevrier as agents of the Union on October 19, 20, and 21. The Respondent asked the court to enjoin the defendants from ''(1) [p]icketing, patrolling or distributing handbills of any kind or description on the premises of GAYFERS; and (2) [c]ommitting any other unlawful act which constitutes a trespass upon plaintiff s premises.''

At an October 28 hearing, a state court judge refused to enjoin all distribution of the handbills as requested, and instead issued a temporary restraining order directing the defendants to desist and refrain from ''[e]ngaging in any picketing, patrolling or passing out of handbills of any kind or description in the interior and within twenty feet from the exterior doorway of Plaintiff's premises.'' Because the Respondent's property ends at the north interior mall entrance to the Respondent's store, and property owned by the Volusia Mall begins there, the handbillers could not move 20 feet or more from the Respondent's mall entrance without stationing themselves on property owned by Volusia Mall. The Volusia Mall manager refused permission to handbillers to stand on the mall property.

On October 29, employee Brown distributed handbills at the Respondent's mall entrance during his lunchbreak. He stood on the Respondent's interior selling area. Brown's presence was limited to approximately the first 31 inches of the interior selling area, which represents the width of floor space between the beginning of the Respondent's property at the mall entrance and a security barrier which was in the ''up'' position. Brown could not stand in any other position without trespassing on the Volusia Mall property. Employees Evans and Chevrier distributed handbills outside the south exterior entrance to the store during their lunchbreak. All three employees were again instructed by the Respondent to cease handbilling under threat of arrest. At about 3:30 p.m., the Respondent again attempted to have the police remove the Baroco employees from its property as trespassers. The police refused to act.

On November 2, the police were again summoned by the Respondent to the store to respond to handbilling by the three Baroco employees. Officer L.R. Brimkeroff advised Brown that he could not handbill at the mall entrance to the store by court order. Brown explained that the mall entrance was not an exterior door, so that it was impossible for him to move 20 feet away without trespassing on mall property. The police officer advised Brown that, if he handbilled in that location again, he would be forced to put Brown under arrest.

On November 3, Evans, Brown, and Chevrier handbilled again, each standing more than 20 feet from one of the store's exterior entrances. No attempt was made to distribute handbills at the mall entrance. They were again advised by the Respondent's representatives to cease handbilling under threat of arrest. The following day, the Respondent filed a contempt notice motion in state court, and hearing was set for November 12. At the hearing, the judge instructed the defendants that they could not distribute leaflets outside the store's north interior mall entrance if they were less than 20 feet away from the entrance. This effectively precluded all leafletting at the mall entrance.

B. *The Parties' Contentions*

The General Counsel contends that the balancing test set forth in *Jean Country*, 291 NLRB 11 (1988), governs the access rights of the employees of a subcontractor engaged in area-standards handbilling directed at customers of the property owner. According to the General Counsel, that balance should be struck in favor of accommodating the protected handbilling, and the Respondent violated Section 8(a)(1) by threatening employees with arrest for the handbilling and having them removed from the Respondent's property. The General Counsel posits an alternative argument in the event that the Board should hold that the appropriate access standard for the employees' handbilling is the Supreme Court's decision in *Lechmere, Inc. v.*

NLRB, 502 U.S. 527 (1992). Under the ''general rule'' of *Lechmere* and *NLRB v. Babcock & Wilcox*, 351 U.S. 106 (1956), an employer may bar nonemployee union organizers from its property unless there is no reasonable nontrespassory means for them to communicate their message. The General Counsel argues that, even under this standard, the handbillers here do not fit within the general rule, and therefore they were lawfully on the Respondent's property, and the Respondent interfered with their protected activity in violation of Section 8(a)(1). Finally, the General Counsel urges that the Respondent's no-solicitation/no-distribution ban be found overly broad and that its maintenance and enforcement be found to violate Section 8(a)(1).

The Respondent argues that the Baroco employees were not employees of Gayfers and therefore are nonemployees within the meaning of *Babcock & Wilcox* and *Lechmere*. Under this standard, the Respondent argues, the General Counsel has not sustained its ''heavy'' burden of demonstrating that the employees were ''beyond the reach'' of nontrespassory methods of communicating with employees, id., 502 U.S. at 540, and therefore has not established a violation of Section 8(a)(1). The Respondent also argues that, under Board precedent, retail stores such as Gayfers may ban solicitation and distribution of literature on ''selling floors'' and ''selling areas,'' citing *J. C. Penney Co.*, 266 NLRB 1223 (1983). According to the Respondent, the solicitation activities of employees of a contractor or subcontractor may be lawfully restricted by its policy to those locations on the Respondent's premises where the contractor or subcontractor is engaged in its business, and it may prohibit all solicitation directed at employees and customers of the Respondent.

The Charging Party argues that, because the Baroco employees were not ''strangers'' to Gayfers property, their right to handbill is determined by the standard applicable to employees, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Under that test, the Charging Party argues, the Respondent was not privileged to ban the handbilling because it has not demonstrated that the interference was necessary to maintain production or discipline. The Charging Party also contends that the Respondent violated Section 8(a)(1) by maintaining and enforcing an overly broad no-solicitation/no-distribution rule.

C. *Discussion*

1. Interference with handbilling

The Section 7 right of employees to organize differs fundamentally from the rights of nonemployee union organizers. The Supreme Court has recognized a ''distinction of substance'' between the rights of employees who are rightfully on the employer's property pursuant to the employment relationship and nonemployee union organizers, and distinctly different rules of law apply to each. Under *Republic Aviation*, supra, the standard governing the rights of employees, an employer may not bar the distribution of union literature in nonworking areas of its property during nonworking time unless the employer can justify its rule as necessary to maintain discipline and production. 324 U.S. at 113.

Organizational solicitation by nonemployees who are strangers to the employer's property is regulated by a more exacting standard:

> Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on the property.

Babcock & Wilcox, supra, 351 U.S. at 113. This has been reaffirmed in *Lechmere*. There the Court also drew ''a critical distinction'' between employee and nonemployee solicitation. 502 U.S. at 509.

The distinction between the rights of employees under *Republic Aviation* and those of nonemployees under *Babcock & Wilcox* and *Lechmere* has been further delineated in several other Supreme Court decisions. In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court stated that

> [a] wholly different balance was struck [in *Republic Aviation*] when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved.

Id. at 521 fn. 10. In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Court noted that ''the nonemployees in Babcock & Wilcox sought to trespass on the employer's property, whereas the employees in *Republic Aviation* did not.'' Id. at 571. In *Eastex*, the Court approved the Board's application of the *Republic Aviation* standard to employees who had disseminated an informational newsletter to employees in nonworking areas of the employer's property during nonworking time. Having concluded that the employees distributing the handbills were ''as in *Republic Aviation*, . . . 'already rightfully on the employer's property,'''and that managerial rather than property rights were at issue, the Court rejected the contention that a more restrictive solicitation standard must apply simply because the union' handbilling did not address purely organiza-

tional matters. The employer's legitimate interests in this situation, the Court noted, do ''not vary with the content of the material [that the employees disseminate.]'' Id. at 572.

In *Southern Services*, 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992), the Board considered the standard to apply when employees regularly and exclusively work on the premises of an employer other than their own. There, the Coca Cola Company had contracted with a cleaning contractor, Southern Services (SSI), which the union was seeking to organize, to provide it with janitorial services at its Atlanta headquarters. An SSI employee, who reported to work at Coca Cola headquarters and worked there exclusively, was ordered not to distribute union literature to fellow employees on nonworking time by representatives of Coca Cola. Coca Cola relied on its policy prohibiting distribution or solicitation by nonemployees on its property.

The Board found, and the court affirmed, that Coca Cola had unlawfully interfered with the SSI employees' Section 7 rights. When employees regularly and exclusively work on the premises of an employer other than their own, the Board held, they are not strangers to the property but are ''already rightfully on [Coke's] property'' reporting to work pursuant to the employment relationship. Id. at 1155, quoting *Hudgens*, supra, 424 U.S. at 521 fn. 10.

As in *Southern Services*, the Baroco employees report only to the Respondent's department store, where they perform electrical subcontract work pursuant to their employment relationship with Baroco. According to the parties' stipulation, they were so employed from at least August 27, 1993, the date on which the Union advised Baroco that these three employees were on its organizing committee, until at least November 12, 1993, the date that the state court ordered them to cease handbilling at the Respondent's store. Because employees Evans, Brown, and Chevrier work exclusively and regularly at Gayfers,[2] they were not ''strangers'' to the Respondent's property, but rightfully on it pursuant to their employment relationship. As such, their rights to engage in Section 7 activity during nonworking time in nonwork areas of the Respondent's premises are established by the standard of *Republic Aviation* and not, as the Respondent urges, *Babcock & Wilcox* and *Lechmere*.

The dissent accepts the Respondent's contention that the *Republic Aviation* standard does not apply to the activities of these employees because their handbilling was directed to the public, not to each other. We disagree. As the Supreme Court has observed in *Eastex*, supra, once it is established that the employees are ''already rightfully on the employer's property,'' the employer's legitimate interest in regulating their activity is solely a managerial one, and one that, at the very least, does ''not vary with content of the material [that the employees disseminate.]'' *Eastex*, 437 U.S. at 572. The Court also expressly declined to mandate that the Board ''engage in such refinement of its rules'' so as to distinguish ''not only between literature that is within the protection of Section 7, but also among subcategories of literature within that protection.'' Id. at 574. These handbillers were employees of Baroco who directed an area-standards message to the public as part of their campaign to organize their fellow Baroco employees. That message is subject to no 8(b)(4) proscription;[3] rather, it is affirmatively protected by Section 7.[4]

Applying *Republic Aviation* to this case, we find that the Respondent has not shown that the Baroco employees' handbilling at the entrances to its store during nonworking time in nonsales areas of the store would interfere with production and discipline at those locations. Accordingly, we find that, by threatening Evans, Brown, and Chevrier with arrest and causing them to be removed from the Respondent's property by the police, the Respondent has interfered with, restrained, and coerced their exercise of rights guaranteed in Section 7 in violation of Section 8(a)(1) of the Act.

2. The Respondent's no-solicitation/no-distribution rule

The complaint alleges that the Respondent's principal no-solicitation/no-distribution rule is overly broad and presumptively invalid. We agree. The Respondent's rule prohibits solicitation or distribution by ''anyone'' not only in selling areas, in which the Respondent is privileged to ban these activities,[5] but also ''in any other area used by the public at any time during the store's open hours.'' Because the rule on its face

[2] The Respondent argues that *Southern Services* is factually distinguishable because, unlike the maintenance service employer in that case, the electrical construction services of Baroco are not involved in the ongoing, daily operations of the Respondent's store. We do not find this distinction persuasive as the issue is whether the employees are rightfully on the property as a result of the employment relationship.

The Respondent further contends that the three Baroco electricians, unlike the employees in *Southern Services*, were ''temporary'' and thus did not work ''exclusively and regularly'' at the Gayfers' store. But during the time period when Baroco was performing electrical work at the Gayfers jobsite, Baroco's employees were effectively working exclusively and regularly at Gayfers. According to the parties' stipulation, at ''the times material herein,'' employees Evans, Brown, and Chevrier ''were employed by Baroco to work solely at Respondent's store performing electrical subcontract work pursuant to Baroco's subcontract'' with the general contractor.

[3] See *DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 583–588 (1988) (union's peaceful handbilling of customers of mall stores urging a consumer boycott not proscribed under Sec. 8(b)(4)).

[4] See *Smitty's Super Markets*, 284 NLRB 1188 (1987).

[5] See *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983); *May Department Stores Co.*, 59 NLRB 976 (1944).

prohibits protected conduct during ''periods from the beginning to the end of workshifts, periods that include the employees' own time,'' *Our Way, Inc.*, 268 NLRB 394 (1983), it is overbroad, i.e., it and can be interpreted to restrict solicitation and distribution in nonselling areas of the premises, including exterior areas, during breaks and between shifts. Accordingly, the maintenance of the Respondent's principal no-solicitation/no-distribution rule violates Section 8(a)(1).

In addition to the principal rule, the Respondent's handbook has also published a similar rule that restricts, inter alia, ''any distribution of written or printed material in selling areas at any time during the store's open hours nor at any other place on [its] premises during working time.'' The Respondent relied on either or both of these rules when it issued its October 19 letter to the Union advising them that the Baroco employees' handbilling violated its no-solicitation/no-distribution rule. As the Baroco employees were on nonworking time outside, or in nonwork areas of, the Respondent's store,[6] the Respondent's enforcement of its rules to restrict their handbilling violated Section 8(a)(1).[7]

CONCLUSIONS OF LAW

1. By prohibiting subcontractor employees from engaging in protected handbilling in front of its Daytona Beach, Florida store and causing the Daytona Beach police to threaten those employees with arrest for engaging in that activity, the Respondent violated Section 8(a)(1) of the Act.

2. By maintaining and enforcing overbroad no-solicitation/no-distribution rules, the Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist. In addition, it shall be ordered to rescind or modify its no-solicitation/no-distribution rules so that employees are not prohibited from solicitation or distribution for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of the Respondent's premises.

ORDER

The National Labor Relations Board orders that MBI Acquisition Corp. d/b/a Gayfers Department Store, Daytona Beach, Florida, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Prohibiting subcontractor employees from engaging in protected handbilling in front of the Gayfers Department Store in Volusia Mall, Daytona Beach, Florida, and causing the police to threaten these employees with arrest for engaging in the handbilling.

(b) Maintaining and enforcing no-solicitation/no-distribution rules that forbid the solicitation and distribution of material protected by Section 7 anywhere on the Respondent's premises by employees during nonwork time.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or modify the no-solicitation/no-distribution rules that forbid solicitation and distribution of materials protected by Section 7 anywhere on the Respondent's premises during nonwork time.

(b) Within 14 days after service by the Region, post at its Daytona Beach, Florida store copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be mailed to each employee and be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings or in the event that its construction contract with Peters or the electrical subcontract between Peters and Baroco is terminated, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees and the employees of present and former contractors and subcontractors employed at its Daytona Beach, Florida store any time since October 12, 1993.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] The General Counsel does not contend, nor do we find, that the Respondent unlawfully interfered with handbilling activity that occurred in selling areas of the store. Thus, we find no violation in the Respondent's October 29 demand that employee Brown cease handbilling in the Respondent's interior selling area.

[7] Although the complaint also alleges that the Respondent unlawfully promulgated these rules, the General Counsel, in his brief, appears to concede that the record does not support a finding of an unlawful promulgation. We find none.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

MEMBER HIGGINS, dissenting in part.

I do not agree that the employees involved herein had a statutory right to use the Respondent's property for the purpose of encouraging customers to boycott Respondent's business.

Respondent operates a retail store. Renovation work was performed by Baroco. The Union believed that Baroco paid sub-standard wages and benefits, and sought to advertise that alleged fact. To that end, it sought to handbill the Respondent's customers, asking them not to patronize the Respondent. The handbilling was carried out by Baroco's employees. It took place on the Respondent's property, and the Respondent forbade it for that reason.

My colleagues cite *Republic Aviation*,[1] for the proposition that employees of an employer can engage in distribution in the nonwork areas of their employer's property. I do not agree that *Republic Aviation* applies to this case. Concededly, the distributors here were employees, like the employees in *Republic Aviation* and unlike the union organizers in *Lechmere*. Further, although they were employees of a contractor (rather than employees of the property owner), I agree that they were rightfully on the property.[2] However, that is where the similarity ends. In *Republic Aviation*, the employees sought *to organize other employees* on the property. Similarly, in *Southern Services*, the employees of the subcontractor sought to organize their fellow employees on the Coca-Cola property. The Supreme Court has recognized that the worksite is a particularly appropriate place for such organizational activities.[3]

However, the instant case does not involve employees who sought to engage in organizational activity aimed at their coemployees. Rather, as noted above, it involves employees who sought to persuade the public not to patronize the Respondent-property owner. In my view, although an employer must permit on-site organizational activities among its own employees and among the employees of its contractors, it is a massive stretch to say that the employer must permit on-site activities that are aimed at a customer boycott. The stretch becomes even larger where, as here, the dispute is based on area standards, not on organizational issues. Finally, the stretch becomes still larger where, as here, the area-standards dispute is not between the employer and the union. In sum, I am not prepared to say that an employer must open up its property to allow persons to inflict economic injury on its enterprise (through a consumer boycott) particularly where, as here, the employer is a neutral to the underlying area-standards dispute.

My colleagues say that the substance of the message is irrelevant. However, the Supreme Court has clearly indicated that the substance of the message *does* make a difference in striking the balance between Section 7 rights and property rights. More particularly, the Supreme Court has indicated that some Section 7 rights are entitled to less weight than others when balanced against property rights. Significantly, in this connection, the Court said that area-standards activity, like that involved herein, stands far below the Section 7 right to organize fellow employees.[4]

Thus, the substance of the message is relevant in balancing Section 7 rights and property rights. *Eastex* is not to the contrary. In that case, employees sought to speak to other employees about employment-related matters. By contrast, as noted, the instant case involves employees who sought to communicate with customers, for the purpose of urging a consumer boycott. That factual scenario is well beyond *Eastex*.

In sum, I conclude that *Republic Aviation* does not apply to this case. I also believe that the Section 7 right involved herein (asking for a consumer boycott of an employer because of standards maintained by the employer's contractor) is not on a par with the Section 7 right to organize fellow employees. Finally, it is clear that the General Counsel has not met his burden of showing that the customers could not be reached elsewhere. In these circumstances, I would find no violation.[5]

[1] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[2] *Southern Services*, 300 NLRB 1154 (1990).

[3] *Beth Israel v. NLRB*, 437 U.S. 483, 491 (1978).

[4] *Sears v. Carpenters*, 436 U.S. 180 fn. 42 (1978); *Oakland Mall*, 316 NLRB 1160 fn. 14 (1995).

[5] Although I agree that the Respondent's no solicitation/no distribution rule was unlawful insofar as the rule pertains to its employees, I do not agree that the rule is unlawful insofar as it was applied to the activities of the Baroco employees involved herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit subcontractor employees from engaging in protected handbilling in front of the Gayfers Department Store in Volusia Mall, Daytona Beach, Florida, and WE WILL NOT cause the police to

threatened these employees with arrest for engaging in the handbilling.

WE WILL NOT maintain and enforce no-solicitation/no-distribution rules which forbid the solicitation and distribution of material protected by Section 7 of the Act anywhere on our premises by employees during nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL rescind our no-solicitation/no-distribution rules so as no longer to forbid solicitation and distribution of materials protected by Section 7 anywhere on our premises during nonworking time.

MBI ACQUISITION CORP. D/B/A
GAYFERS DEPARTMENT STORE